



PATENT

NOTICE OF APPEAL TO THE  
BOARD OF PATENT APPEALS AND INTERFERENCES

IN RE APPLICATION OF: William T. BALL  
SERIAL NO. : 10/674,862  
FILED : September 30, 2003  
TITLE: : METHOD AND MEANS FOR AN OVERFLOW  
ASSEMBLY TO BATHTUBS AND THE LIKE  
Group/A.U. : 3751  
Examiner : Robert M. FETSUGA  
Conf. No. : 6280  
Docket No: : P06474US1-153

Box BPAI  
Commissioner of Patents  
P.O. Box 1450  
Alexandria, VA 22313-1450

Dear Sir:

Applicant hereby appeals to the Board of Patent Appeals and Interferences from the decision of the Examiner dated October 6, 2005 rejecting claim 12, 15 and 16.

Applicant is a small entity under 37 CFR 1.9 and 1.27. The items checked below are appropriate:

[X] A check in the amount of \$250 is enclosed.

[X] The Commissioner is hereby authorized to charge any deficiencies which may be required, or credit any overpayment to Deposit Account No. 50-2098.

[X] An Appeal Brief is attached.

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Josef L. Hoffmann

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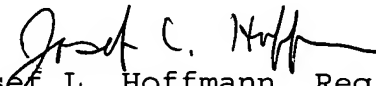
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[ ] A Petition for Extension of Time under 37  
CFR 1.136(a) is enclosed.

Two additional copies of the notice are enclosed.

Respectfully submitted,

  
Josef L. Hoffmann, Reg. #56,203  
ZARLEY LAW FIRM, P.L.C.  
Capital Square  
400 Locust Street, Suite 200  
Des Moines, IA 50309-2350  
Phone Number (515) 558-0200  
Fax Number (515) 558-7790  
Customer No. 34082  
Attorneys of Record

- [JLH/jlk] -



BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES

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APPEAL BRIEF

Dear Sir:

This is an appeal from the final rejection of claims 12, 15 and 16 dated October 6, 2005.

I. Real Party In Interest:

The real party in interest of the instant appeal is WCM Industries, Inc., a Colorado corporation, having an address of 2121 Waynoka Road, Colorado Springs, Colorado 80915.

II. Related Appeals and Interferences:

There are no related appeals or interferences.

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CERTIFICATE OF MAILING (37 C.F.R. § 1.8(a))

I hereby certify that this document and the documents referred to as enclose therein are being deposited with the United States Postal Service as First Class mail addressed to: Mail Stop Appeal Brief - Patents, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450, on this 18 day of November 2005.

Josef L. Hoffmann

### III. Status of the Claims:

Presently, claims 12, 15 and 16 are pending in this application and appear as Appendix A of this brief.

### IV. Status of Amendments:

Since the final rejection of October 6, 2005, no amendments have been made to the claims.

### V. Summary of Claimed Subject Matter:

Claim 12 is for an overflow assembly for a bathtub 18. The overflow assembly has an overflow pipe 34 having a flange 52 and sleeve 56 that extends outwardly from the flange for receiving an inner end of a hollow fitting 58 having an outer end 62 and threads on an outer surface. (Page 5, lines 16-28). The overflow assembly also has a nut 68 having a threaded center opening or bore 70 threadably mounted on the fitting 58 to exert pressure towards the flange 52. (Page 6, lines 5-9). The nut 68 also has an outer periphery 72 with a series of radially extending lugs 74 which frictionally detachably engage an inner surface of flange 76 of cap 78 that fits over the nut. (Page 6, lines 9-12) Specifically the cap 78 is selectively positioned on the nut 68 to direct an overflow of water to the overflow pipe. (Page 6, lines 12-17).

Claim 15 adds the limitation of the cap 78 having a notch 80 that is located in the flange 76 which is selectively positioned to direct overflow of water into the overflow pipe. (Page 6, lines 14-17). Meanwhile, claim 16 adds the limitation of the notch 80 being moved to a six o'clock position when the cap 78 is mounted to the nut 60 for

directing the overflow of the water into the overflow pipe.  
(Page 6, lines 14-17).

#### VI. Grounds of Rejection to Be Reviewed On Appeal

The Examiner has rejected claims 12, 15 and 16 under 35 U.S.C. § 103(a) as being unpatentable over Lewis (U.S. Pat. Publication No. 2002/0032926), Fritz et al. (U.S. Pat. No. 6,192,531) and Espey et al. (U.S. Pat. No. 5,350,266).

#### VII. Argument

##### A. Description of the Prior Art

##### 1. Lewis (U.S. Publication No. US2002/0032926).

Lewis discloses an overflow elbow 20 that has a threaded member 23. (Par. 0020). Threadably engaging the threaded member 23 is a capture nut 21 having matching interior threads 22 therein. (See Par. 0020). A foam gasket 9 is placed upon elbow 20 and is a size and shape such that the lugs fit within the opening of the gasket 9 and the flange 24 of capture nut 21 and is able to compress foam gasket 9. (See Pars. 0020-0021 and Par. 0030). Additionally test plug 8 is placed within the opening of the threaded member 23. (Par. 0021).

##### 2. Fritz (U.S. Pat. No. 6,192,531)

Fritz discloses an elbow 26 having an internally threaded female end 24 for engaging the male threaded section 30 of a retaining body 12. (Col. 3, lines 4-15). The disclosure also teaches a chamfered washer 14 having an interior tub gasket 16 and having a flange wall 46 with an annular flange shoulder 50. (Col. 3, lines 26-51). The chamfered washer 14 also has a cylindrical collar section 44 that is slightly greater than the outside diameter of the

male threaded section 30 of retaining body 12 to permit threaded section 30 to extend through it in closely fitted relationship. (Col. 3, lines 26-51).

Fritz also teaches the use of a cover 18 that covers the retaining body 12, chamfered washer 14 and interior sealing gasket 16. (Col. 3, lines 52-67). The cover 18 has a plurality of tabs 64 directed radially inwardly from the inside of its side wall 52 to provide frictional engagements between cover 18 and the flange wall 46 or flange shoulder 50 of chamfered washer 14. (Col. 3, lines 52-67). The circumferentially extending side wall 52 of cover 18 is preferably slotted or recessed along its bottom or lower side edges, and the width of slots 54 is sufficient to permit tub waste overflow to enter bore 28.

3. Espey et al. (U.S. Pat. 5,350,266)

Espey teaches a nut 20 on a bicycle frame 10 that receives a cap 40 to provide a nut and cap assembly. (Col. 2, lines 38-54). Nut 20 has six generally planar side faces 21-26 as well as parallel faces 27 and 28. (Col. 2, lines 55 and 56). Each side face of the nut is provided with two opposed slots 32 and 33 in axial alignment that are separated by a bridge portion 34 that lies in the central plane of the nut. (Col. 2, line 64 - Col. 3, line 3). The cap 40 has side walls 41-46 that have radial projections 52 that extend inwardly from the inner face wherein each projection has a ramp 53 extending inwardly and downwardly. (Col. 3, lines 11-24). When the cap 40 is assembled onto the nut 20, the projections 52 are received in the respective slot 32 of the side faces of nut 20. (Col. 3, lines 30-33). As the cap is moved further, the ramps 53 of the projections 52 engage the bridge portions 34 of the nut so that further movement flexes the side walls 41 through 46 radially outwardly to permit

projections to move across the respective bridge. (Col. 3, lines 33-38). Once the projections have moved in an axial direction sufficient to clear the bridge, the walls flex inwardly to bridge the inward end faces 54 with projections in tight contact with the end wall 36 of the respective second slot 33. (Col. 3, lines 39-43).

B. Argument in Support of Reversal

Rejection under 35 U.S.C. § 103

Claims 12, 15 and 16 are pending in the present application. Claims 12, 15 and 16 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Lewis, Fritz et al. and Espey et al. Applicant respectfully traverses the rejection. An obviousness analysis begins in the text of section 103 with the phrase "at the time the invention was made." For it is this phrase that guards against entry into the "tempting but forbidden zone of hindsight when analyzing the patentability of claims pursuant to that section. See Loctite Corp. v. Ultraseal Ltd., 781 F.2d 861, 873, 228 USPQ 90, 98 (Fed. Cir. 1985), overruled on other grounds by Nobelpharma AB v. Implant Innovations, Inc., 141 F.3d 1059, 46 USPQ 2d 1097 (Fed. Cir. 1998). Measuring a claimed invention against the standard established requires the often difficult but critical step of casting the mind back to the time of the invention, to consider the thinking of one of ordinary skill in the art, guided only by the prior art references and then-accepted wisdom in the field. See, e.g. W.L. Gore & Assoc., Inc. v. Garlock, Inc., 721 F.2d 1540, 1553, 220 USPQ 303, 313 (Fed. Cir. 1983). Close adherence to this methodology is especially important in the case of less technologically complex inventions, where the very ease with which the invention can be understood may prompt one "to fall

victim to the insidious effect of a hindsight syndrome wherein that which only the inventor taught is used against the teacher." Id.

The best defense against the subtle but powerful attraction of a hindsight-based obviousness analysis is rigorous application of the requirement for a showing of the teaching or motivation to combine prior art references. See, e.g., C.R. Bard, Inc. v. M3 Sys., Inc., 157 F.3d 1340, 1352, 48 USPQ 2d 1225, 1232 (Fed. Cir. 1998) (describing "teaching or suggestion or motivation [to combine] as an essential evidentiary component of an obviousness holding") combining prior art references without evidence of such a suggestion, teaching, or motivation simply takes the inventor's disclosure as a blueprint for piecing together the prior art to defeat patentability - the essence of hindsight. See, e.g. Interconnect Planning Corp. v Feil, 774 F.2d 1132, 1138, 277 USPQ 543, 547 (Fed. Cir. 1985) ("The invention must be viewed not with the blueprint drawn by the inventor, but in the state of the art that existed at the time.") In this case, the Examiner has fallen into the hindsight trap.

Evidence of a suggestion, teaching or motivation to combine may flow from the prior art references themselves, the knowledge of one of ordinary skill in the art, or, in some cases, from the nature of the problem solved, although the suggestion more often comes from the teachings of the pertinent references. Rouffet, 149 F.3d at 1355. The range of sources available does not diminish the requirement for actual evidence. That showing must be clear and particular. See, e.g., C.R. Bard, 157 F.3d at 1352. Broad conclusory statements regarding the teaching of multiple references, standing alone, are not evidence. e.g., McElmurry v. Arkansas Power & Light Co., 995 F.2d 1576, 1578, 27 USPQ 2d



1129, 1131 (Fed. Cir. 1993) ("Mere denials and conclusory statement, however, are not sufficient to establish a genuine issue of material fact.").

The obvious rejection asserted by the Examiner is based on a combination of prior art references, e.g. the overflow assembly of Lewis combined with the locking nut of Espey and the cap of Fritz. To justify this combination the Examiner stated that "[i]t would have been obvious in light of the combined teachings of Lewis, Fritz, and Espey to engage the cap taught [by] Fritz with a nut having lugs as taught by Lewis and Espey in order to provide the benefit of the cap as disclosed by Fritz with an overflow assembly of the type having a nut with lugs." (October 6, 2005 Office Action, Pg. 3, lines 14-18). Rather than pointing to specific information in Lewis, Espey, or Fritz that would suggest a combination, the Examiner describes the general structure of each reference. Nowhere does the Examiner particularly identify any suggestion, teaching, or motivation to combine the prior art references such as the identification of the relevant art, the level of ordinary skill in the art, the nature of the problem to be solved, or any other factual findings that might serve to support an obviousness analysis. See e.g., Pro-Mold & Tool, 75 F.3d 1568, 1573, 37 U.S.P.Q. 2d 1626, 1630 (Fed. Cir. 1996).

To the contrary, the decision is based on a discussion of the ways that the multiple prior art references can be combined to read on the claimed invention. This reference-by-reference, limitation-by-limitation analysis fails to demonstrate how the Espey or Fritz references suggest their combination with Lewis to yield the claimed invention. Conspicuously missing is any evidence, other than the Examiner's speculation, that one of ordinary skill in the art

would have been motivated to make the modifications of the prior art necessary to arrive at the claimed invention. See In re Jones, 958 F.2d 347, 351 (Fed. Cir. 1992); Grabiak, 769 F.2d at 731-32).

Accordingly, because the Examiner has not particularly identified any suggestion or motivation to combine the prior art references as suggested, the prima facie burden is not met and the obviousness rejection is considered overcome.

Even if there were a suggestion or motivation to combine the prior art references, the proposed combination would not result in the invention as claimed. To establish a prima facie case of obviousness, all the claim limitations must be taught by the prior art. In re Royka, 490 F.2d 981, 180 U.S.P.Q. 580 (CCPA 1974).

Claims 12, 15 and 16 all require in part a "nut having an outer periphery with a series of radially extending lugs which frictionally detachably engage an inner surface of the flange on a cap". The nut 68 of the claimed invention is threaded onto surface 62 to draw the washer 66 into tight engagement with flange 52 of port 54. The lugs 74 on the outer periphery 72 of the nut 68 allow the cap 78 to be easily installed and rotated to position notch 80 without loosening nut 68.

In contrast, Lewis, while teaching a locking nut, does not teach a nut having a series of lugs on its outer periphery for receiving a cap. Rather, as shown in Figs. 4, 5, and 6, Lewis teaches the use of threaded opening 51 supported within elbow 40 by extruded protrusion 50 to provide for the installation of a test plug 8. [0028]. The threaded protrusion is also known in the art as the structure used to attach a cap to an assembly by use of a screw. For

example, as described in the background of the invention, U.S. Patent No. 5,890,241 taught that the cap was held in place by screws that extended through the plate. Thus, Lewis provided no teaching of lugs that frictionally detachably engaged the inner surface of the flange of the cap and rather teaches away from Applicant's claimed invention.

Espey, according to the Examiner, cures Lewis of this deficiency by providing a nut 20, with lugs 21-26, that receive a cap 40. Espey teaches that "the cap is pressed downwardly over the nut in such a way that the projections 52 are received in the respective slot 32 of the side faces of the nut 20. As the cap is moved further, the ramps 53 of the projections 52 engage the bridge portions 34 so that further movement flexes the sidewalls 41-46 radially outwardly to permit the projections to move across the respective bridge. Once the projections have moved in an axial direction sufficient to clear the bridge, the walls flex inwardly to bring the inward end faces 54 of the projections in tight contact with the end wall 36 of the respective second slot 33". (Col. 3, lines 31-43).

Thus, there is no teaching that the lugs (21-26) frictionally detachably engage the inner surface of the flange of the cap. Rather, the cap is fitted to the nut by pressing downwardly such that the projections 52 snap into slots 33. Such an arrangement is not frictionally detachable and would require a tool of some sort to pry the projections out of slot 33. Also, the cap of Espey would not spin independently of the nut once installed, and if the cap were turned, such as to position a notch the nut would be loosened.

The Examiner further relies on Fritz to teach the use of lugs 64 to frictionally detachably engage the cap with hollow

fitting (via 14, 32). (October 6, 2005 Office Action, pg. 3, lines 10-12). To begin, Fritz does not disclose a locking nut. In addition, what the Examiner identifies as lugs, are actually tabs or other protrusions directed radially inward from the inside of sidewall 52 of cover 18 to provide frictional engagement between cover 18 and flange wall 46 or flange shoulder 50 of chamfered washer 14. (Col. 3, lines 55-59). Thus, like Espey, Fritz relies on projections extending inwardly from the inner surface of the flange of the cap. Thus, even if there were a suggestion to combine the locking nut of Espey, and the cap of Fritz to the overflow assembly of Lewis, the resulting combination still would not have lugs on the outer periphery of the locking nut that frictionally detachably engaged an inner surface on the flange of the cap. Instead, the proposed combination would result in a locking nut having lugs that engage projections extending inwardly from the inner surface of the flange of the cap. The only way to arrive at the invention as claimed is to impermissibly use Applicant's disclosure as a blueprint to modify the prior art to arrive at the invention as claimed.

Accordingly, as the proposed combination does not result in the invention as claimed, the Examiner has failed to present a prima facie case of obviousness and as a matter of law, the rejection cannot stand.

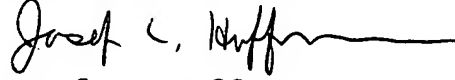
#### VIII. Conclusion

Thus Applicant respectfully request the Board overturn the Examiner's decision with regards to the rejection of claims 12, 15 and 16.

A check in the amount of \$250 has been included with this appeal brief. No other fees or extensions of time are

believed to be due in connection with this response; however, consider this a request for any extension inadvertently omitted, and charge any additional fees to Deposit Account 50-2098.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Josef L. Hoffmann", with a long, sweeping horizontal line extending to the right.

Josef L. Hoffmann  
Reg. No. 56,203  
ZARLEY LAW FIRM, P.L.C  
Capital Square  
400 Locust Street, Suite 200  
Des Moines, IA 50309-2350  
Phone No. (515) 558-0200  
Fax No. (515) 558-7790  
Customer No. 34082  
Attorneys of Record

JLH/jlk  
Attachment: Appendix A

APPENDIX A

VIII. Claims Appendix



Listing of Claims:

Claims 1-11 (cancelled)

Claim 12. (Previously presented) An overflow assembly for a bathtub, comprising:

an overflow pipe having a flange and a sleeve that extends outwardly from the flange for receiving an inner end of a hollow fitting having an outer end and threads on an outer surface;

a nut having a threaded center opening threadably mounted on the fitting to exert pressure towards the flange; and the nut having an outer periphery with a series of radially extending lugs which frictionally detachably engage an inner surface of the flange on a cap which fits over the nut, wherein the cap is selectively positioned on the nut to direct an overflow of water to the overflow pipe.

Claim 13. (Cancelled)

Claim 14. (Cancelled)

Claim 15. (Previously presented) The assembly of claim 12 wherein the cap has a notch in the flange, which is selectively positioned to direct the overflow of water into the overflow pipe.

Claim 16. (Previously presented) The assembly of claim 15 wherein the notch is moved to at least a six o'clock position when the cap is mounted to the nut for directing the overflow of water into the overflow pipe.

VIV: Evidence Appendix

None.

X: Related Proceedings Appendix.

None